

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GOETZ and SONS WESTERN MEAT LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. C07-00986MJP

ORDER GRANTING MOTION
TO DISMISS

This matter comes before the Court on Defendant's motion to dismiss.¹ (Dkt. No. 15.) After reviewing the moving papers, Plaintiff's response (Dkt. No. 23), Defendant's reply (Dkt. No. 27), and all papers submitted in support thereof, the Court GRANTS Defendant's motion. The Court's reasoning is set forth below.

Background

Plaintiff Goetz and Sons Western Meat L.L.C. ("Goetz"), owned by James D. Horton, produces and distributes meat products in Washington. (Am. Compl. ¶¶ 1.1, 2.1.) For most of 2005, Danese Smith was the United States Department of Agriculture ("USDA") inspector for Goetz. (Am. Compl. ¶ 3.1.) Between January 1, 2005 and April 10, 2005, Ms. Smith issued three non-compliance reports ("NRs") on Goetz, and three more between July 10, 2005 and September 22, 2005. (Am. Compl. ¶¶ 3.2-3.3.)

During an inspection on September 20, 2005, Ms. Smith noted uncovered meat and the presence of flies. (Am. Compl. ¶ 3.4.) When she returned to the plant the next day, she was

¹ A Joint Stipulation filed on January 24, 2008, indicates that Defendant's Motion to Dismiss should be considered against the Amended Complaint.

1 unable to enter the premises through the garage door, and she became “animated” and accused
2 nearby employees of “hiding things.” (Am. Compl. ¶ 3.5.) Mr. Horton complained about Ms.
3 Smith’s conduct to her direct supervisor, Dr. Gregory Sherman, who asked that Mr. Horton
4 prepare a written complaint. (Am. Compl. ¶ 3.6.)

5 On September 28, 2005, Ms. Smith tested a two-pound sample of natural juice ham for
6 the bacteria *Listeria monocytogenesis*; the test came back positive. (Am. Compl. ¶ 3.7.) Plaintiff
7 alleges that Ms. Smith did not gather the sample in accord with USDA procedure, which requires
8 that samples be taken from “commercial production run[s].” (Am. Compl. ¶ 3.7.)

9 On November 1, 2005, Ms. Smith was notified that the Goetz plant experienced a
10 “heating deviation” while preparing beef strips and honey-cured hams. (Am. Compl. ¶ 3.8.) On
11 November 22, 2005, the USDA asked Goetz if it had taken measures against *Staphylococcal*
12 *aureus* enterotoxin after the heating deviation. (Am. Compl. ¶ 3.10.) Goetz had re-cooked the
13 affected beef strips and ham but had not tested for the pathogen, and placed a hold on the affected
14 meat after the USDA’s inquiry. (Am. Compl. ¶¶ 3.8, 3.10.) On November 23, 2005, the USDA
15 suspended operation of Goetz’s “Ready-to-Eat” (“RTE”) program until proper testing for the
16 pathogen could be completed. (Am. Compl. ¶ 3.10.) The tests were conducted by a Puget Sound
17 agent and indicated a 95% statistical confidence that the pathogen was not present. (Am. Compl.
18 ¶¶ 3.10-3.11.) A report was presented indicating the 95% confidence level to Dr. James Adams,
19 co-manager of the Denver District Office of the USDA, who required additional testing. (Am.
20 Compl. ¶¶ 3.11, 3.17.) Plaintiff alleges that 70% is the “normal” confidence level required for
21 this pathogen and that the heightened requirement and additional testing was not mandated by
22 regulations. (Am. Compl. ¶ 3.11.)

23 On December 1, 2005, the USDA reinstated Goetz’s RTE program. (Am. Compl. ¶
24 3.13.) When Ms. Smith later inspected the hold items on December 16, 2005, she noticed that
25 almost 50 pounds of beef strips were missing. (Am. Compl. ¶ 3.14.) Plaintiff alleges that the hold
26 tags were accidentally removed on November 31, 2005 and the meat was sold. (Am. Compl. ¶
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3.14.) The USDA then ordered Goetz to suspend all operations, including products with no known problems. (Am. Compl. ¶ 3.14.) On December 29, 2005, the USDA allowed Goetz to resume operations for “raw and pass-through products.” (Am. Compl. ¶ 3.16.)

Plaintiff alleges that Ms. Smith generated an “extremely aberrational” number of NRs against it - 39 NRs between September 27, 2005 and December 31, 2005. (Am. Compl. ¶ 3.17.) Plaintiff’s amended Complaint states five causes of actions against the United States: 1) negligent supervision of an employee of the USDA; 2) negligent supervision of Plaintiff’s business operation; 3) malicious prosecution by the USDA employee; 4) intentional trespass; and 5) breach of a regulatory duty. (Am. Compl. ¶¶ 4.1-8.5.)

The United States moves to the dismiss on the ground that the Court lacks subject matter jurisdiction under Fed. R. Civ. P.12(b)(1) and for failure to state a claim upon which relief can be granted under Fed. R. Civ. P.12(b)(6).

Discussion

Defendant brings a facial attack and asserts that the allegations in the Complaint are “insufficient on their face to invoke federal jurisdiction.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In considering this motion, the Court may not look to material outside the Complaint. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).²

I. Federal Tort Claim Act

The federal government and its agencies are immune from suit unless it consents to waive that immunity. Hercules, Inc. v. United States, 516 U.S. 417, 422 (1996). The FTCA provides a limited waiver of sovereign immunity for:

injury or loss of property... caused by the negligent wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

² The Court need not address Defendant’s Motion to Strike the declaration of Mr. Horton and facts asserted in Plaintiff’s response because the merits of the motion to dismiss are based only on the content of the Amended Complaint.

1 28 U.S.C. § 1346(b)(1). However, the discretionary function exception provides that FTCA
2 jurisdiction cannot be based on “the exercise or performance or the failure to exercise or
3 perform a discretionary function or duty on the part of a federal agency or an employee of the
4 Government whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a) (emphasis
5 added).

6 Although the government has the burden to prove the discretionary function applies,
7 Plaintiff can invoke jurisdiction “only if the complaint is facially outside the exceptions of §
8 2680.” Prescott v. United States, 973 F.2d 696, 701 (9th Cir. 1992). The government must
9 show that (1) a statute, regulation, or policy contains an element of discretion; and (2) the
10 disputed conduct was based on considerations of public policy. Berkovitz v. United States, 486
11 U.S. 531, 536-37 (1988). There is a “strong presumption” that discretionary acts are based on
12 an underlying policy decision. United States v. Gaubert, 499 U.S.315, 324 (1991).

13 **II. Plaintiff’s Claims**

14 The discretionary function exception precludes subject matter jurisdiction over Plaintiff’s
15 claims because all of the alleged actions of Defendant were discretionary and presumed to serve
16 underlying policy purposes. Plaintiff does not allege that Defendant violated any statute,
17 regulation, or policy with the force of law in taking the ham sample, in issuing the NRs, in
18 requiring the “higher than normal” statistical confidence level for testing for Staphylococcal
19 aureus enterotoxin, or in shutting down Goetz’s business operations. See Starrett v. United
20 States, 847 F.2d 539, 541 (9th Cir. 1988) (plaintiff must plead the specific mandatory regulation
21 that government violated to overcome discretionary function exception). USDA inspectors and
22 their supervisors have broad discretion in their decisions to test a company’s compliance with
23 safety standards. See 9 C.F.R § 417.8(g) (listing “sample collection” as one of eight methods
24 FSIS may use to verify business’ Hazard Analysis and Control Plan (“HAACP”)). Additionally,
25 Plaintiff fails to cite any mandatory provision that requires a FSIS inspector to only test from a
26 “commercial production run.” Likewise, 9 C.F.R. § 417 governs the USDA’s general response

1 to potential contamination of a product but leaves the substance of that review to the discretion
2 of the inspector. See In re Supreme Beef Processors, Inc. 468 F.3d 248, 252 (5th Cir. 2006)
3 (USDA's implementation of food safety standard immune because involved "discretionary
4 acts"). Finally, 9 C.F.R. § 500.3 gives Defendant the discretionary authority to suspend or
5 withhold products without prior notice if any of eight grounds are found.

6 Likewise, the management decisions of Ms. Smith's supervisors are discretionary.
7 Plaintiff fails to allege that Ms. Smith's supervisors were prescribed or mandated by statute,
8 regulation, or any other policy that had the effect of law to take a particular action. See
9 GATX/Airlog Co. v. Evergreen Intern. Airlines, 81 F.Supp.2d 1003, 1009 (9th Cir. 1999)
10 (negligent supervision claim dismissed because it failed to "allege any federal statute, regulation
11 or policy that would have required [employee's supervisors] to take particular action"); see also
12 Nurse v. United States, 226 F.3d 996, 1001 (9th Cir. 2000) (ruling that claims of negligent
13 supervision "fall squarely within the discretionary function exception."). Instead, Defendant's
14 supervisory authority over its FSIS agents is broad and discretionary. See United States v. S.A.
15 Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 816-20 (Secretary of Transportation
16 given broad discretion to enforce minimum safety standards, and in enforcing such standards,
17 "[the agency] is exercising discretionary regulatory authority of the most basic kind").

18 Although Plaintiff contends that further discovery will uncover internal policies
19 governing the protocol for an inspector's actions, (Pl. Resp. at 12), internal policies do not have
20 the effect of law and could not transform Plaintiff's claims into claims properly asserting subject
21 matter jurisdiction. See United States v. One 1985 Mercedes, 917 F.2d 415, 423-24 (9th Cir.
22 1990) (unpublished and interpretive internal policies do not have force of law).

23 Additionally, Plaintiff fails to overcome the strong presumption that the actions of
24 Defendant were based on policy considerations. The USDA is given broad authority to
25 establish compliance requirements from private business owners. Those who inspect and those
26 who supervise inspectors have to balance limited governmental resources in deciding whom,

1 when, and how often to inspect, how much scrutiny to apply, and how to best serve the
2 underlying goal of public safety. Decisions involving resource allocation and distribution from
3 governmental agencies are “the type of administrative judgment that the discretionary function
4 was designed to immunize from suit.” Fang v. United States, 140 F.3d 1238, 1241 (9th Cir.
5 1998). This process requires a malleable system of oversight, consistent assessment of public
6 and industry risk, and must afford inspectors the freedom to make objective decisions. Absent a
7 specific regulation or policy with the effect of law requiring Defendant to act in a contrary
8 manner, the above actions are presumed to be grounded in policy considerations. See Gaubert,
9 499 U.S. 328-29 (immunity applied because statutes gave government agency discretion to take
10 a variety of actions to enforce regulatory requirements).

11 In some instances, clearly wrongful actions of government agents may render the
12 discretionary function exception inapplicable. Sabow v. United States, 93 F.3d 1445, 1454 (9th
13 Cir. 1996) (exception did not apply when there could be no policy rationale for threatening
14 family members of dead officers). Plaintiff argues that because Ms. Smith had a retaliatory
15 intent in testing the ham sample and in issuing the 39 NRs, (Pl. Resp. at 13), and because Dr.
16 Adams might have been acting with malice when he made his 95% statistical confidence level
17 requirement, (Pl. Resp. at 15), Defendant’s actions are not protected by the discretionary
18 function exception. However, Plaintiff’s argument fails because it has not alleged that any of
19 Defendant’s actions was groundless. Instead, the facts in the Complaint provide reasonable
20 grounds for an inspector to issue NRs, to require a higher statistical confidence level for the
21 presence of a pathogen, and to shut down business operations: exposed meat, the presence of
22 flies, a positive test for *Listeria monocytogenes*, almost 50 pounds of possibly tainted meat
23 placed on hold and then accidentally sold to the public, and Goetz’ failure to test for
24 *Staphylococcal aureus* enterotoxin after a heating deviation. (Am. Compl. ¶¶ 3.4-3.12.)
25 Several of these events are expressly made grounds for suspension. See 9 C.F.R. § 500.3(a).

26 Additionally, even if the actions of Ms. Smith or Dr. Adams were motivated by a
27

1 retaliatory intent, both the language in 28 U.S.C. § 2680(a) and case law indicates that if the
2 discretionary actions were negligent, wrongful, or an abuse of discretion, the government may
3 still be protected by the discretionary function exception if the action is susceptible to policy
4 analysis. Miller v. United States, 163 F.3d 591, 593 (9th Cir. 1998) (disputed conduct need not
5 actually be grounded in policy considerations). It is the nature of the action and not the
6 subjective intent of the government agent that is the subject of inquiry. See Gaubert, 499 U.S.
7 at 325. Because all of the actions alleged by Plaintiff were both discretionary and presumed to
8 serve a legitimate policy purpose, this Court lacks subject matter jurisdiction to hear Plaintiff's
9 claims.

10 Conclusion

11 Because Plaintiff has failed to assert subject matter jurisdiction under the FTCA, the
12 Court GRANTS Defendant's motion. All claims are dismissed without prejudice

13 The Clerk is directed to send a copy of this order to all counsel of record.

14 Dated: February 17, 2008.

15 /s/ Marsha J. Pechman

16 Marsha J. Pechman

17 District Court Judge